

P E T I T I O N ³

F O R

K Henderson (Jean)

Jean and Grizel Dalrymples, and Alexander Henderson Vintner in Edinburgh, and the Reverend Mr William Forbes Minister, residing at Fishersrow, their Husbands,

A G A I N S T

Hary Guthrie Writer in Edinburgh.

August 7. 1770.

N. B. This petition reclaims against an interlocutor of Lord Barjarg, 13th July. It was presented and moved to the Lords on Friday the 27th July, printed and put into the Lords boxes next morning.—But, at Mr Guthrie's particular desire, was withdrawn from the boxes, on assurance given, that the claim for expences should be amicably settled, and the paragraphs complained of should be judicially deleted.—Mr Guthrie delays; and as the session is near a close, the petitioners find themselves obliged to give the Lords the trouble of advising their petition: And that the whole cause may be before their Lordships, there is subjoined the claim of expences given in to Mr Guthrie, after the petition, at his desire, was withdrawn on Saturday 28th July.



July 27. 1770.

UNTO THE RIGHT HONOURABLE,
The Lords of Council and Session,
T H E
P E T I T I O N
O F

Jean and Grizel Dalrymples, daughters of the deceased William Dalrymple writer to the signet, and Alexander Henderson vintner in Edinburgh, and the Reverend Mr William Forbes minister of the gospel at Musselburgh, their husbands,

Humbly sheweth,

THAT in the question between Hary Guthrie writer in Edinburgh, and the petitioners, which arose in a process of ranking and sale brought by him, which comprehended certain subjects belonging to the petitioners, the Lord Barjarg Ordinary, of this date, pro-Feb. 27. 1770. nounced the following interlocutor. " In respect it is not al-
" ledged, that the defenders brother was bankrupt at the
" date of the disposition, or had not other visible funds more
" than sufficient to pay his debts; that the subjects disponed
" and liferented by the mother, were no more than a rational
" provision for his sisters otherwise unprovided; and that
" infestment was recently taken at the date of the disposition;
A " therefore

“ therefore grants the desire of the representation; and in so far alters the former interlocutor (this had passed in absence), and ordains the said two houses to be struck out of the sale.”

June 28. 1770. That Mr Guthrie having represented, the Lord Ordinary, upon advising representation and answers, adhered.

July 7. 1770. That thereafter, at a calling, Mr Guthrie represented, That he was to acquiesce in the interlocutor, striking the said houses out of the sale; and craved a renewal of the act and commission, and diligence, for proving the libel *quoad* the remaining subjects.

That upon this, the petitioners represented, That it might be necessary for them to extract the procedure hitherto, with respect to their two houses; and therefore they craved that his Lordship would decern in terms of the interlocutor of the 27th February; and likewise find them intitled to their expences.

July 7. 1770. That upon this the Lord Ordinary decerned in terms of the said interlocutor, but found no expences due; and as to the other subjects, pronounced an interlocutor in common form.

That the petitioners represented against this interlocutor, in so far as it found no expences due to them; but the Lord Ordinary refused the representation. And these judgements, in so far as they refuse expences, the petitioners submit to review; as they are hopeful your Lordships will be of opinion, that on account of the clearness of the case, and other circumstances, they are intitled to their expences.

July 13. 1770. The fact is, That William Dalrymple, father to the petitioners, died in June 1732, leaving a widow and six children, viz. a son Robert, and five daughters, all of whom were minors, except the eldest daughter Elisabeth, who in her father's lifetime had been married, and got her portion.

William Dalrymple died suddenly, and intestate. His moveable estate was scrimsly sufficient to pay his debts, which amounted

amounted to about L. 200 Sterling ; so that his daughters could reap nothing by the succession *ab intestato*. But his heritable subjects were very considerable, and devolved wholly to his son Robert, William Dalrymple having been prevented by sudden death from making a settlement ; so that his daughters were thus left destitute, and a burden upon their mother, whose liferent extended over a house in Fisher-row, ten acres of ground at Inveresk, and some houses in Edinburgh.

Robert Dalrymple, brother to the petitioners, about four years after his father's death, when he became of age, executed a disposition, in favour of his four younger sisters, of Jan. 26. 1736. two small houses in Edinburgh, liferented by his mother ; which disposition proceeds upon the following narrative. " Whereas my said father died intestate, without " making any provision for Jean, Katharine, Marion, and " Grizel Dalrymples, his younger children, whereby his " whole estate being almost heritable, accresces to me as " heir foresaid ; and it being just and reasonable my said " sisters should have a share of their said deceased father's " effects and estate ; therefore, and for the love, favour, and " affection I have and bear to the said Jean, Katharine, Marion, and Grizel Dalrymples my sisters, wit ye me to have " made over," &c. This disposition was witnessed by William Frazer writer to the signet, to be after mentioned, who was the most considerable creditor of Robert Dalrymple's father ; and upon this disposition the petitioners were a few days thereafter infeft.

Jan. 30. 1736.

At granting this disposition, not only was there no diligence against Robert Dalrymple, but he was perfectly solvent. All the debts owing by his father were some small open accounts, which were innovated in his person, he having granted his own security therefor. As, 1st, Of this date, he April 8. 1736. granted bond to the said William Frazer for L. 466 : 13 : 8 Scots, with a disposition to his house and garden in Fisher-

row

row in security ; redeemable upon payment of the principal sum, interest, and expences.

Oct. 5. 1737. *2dly*, Of this date, he settled an account due by his father to Sir James Cuninghame, which had lain over for many years, and granted bond for the balance, being L. 1019, 17 s. Scots. And,

Dec. 19 1737. *Lastly*, He granted bond, of this date, to John Wallace for an account of medicines due by his father, amounting to L. 209 : 1 : 4 Scots.

These were all the debts due by his father, and amounted in whole to L. 194 : 4 : 5 Sterling. And these, with a bill for L. 65, due by himself, were the whole debts which Robert Dalrymple owed on any account at the time of granting the above disposition, at which time his funds were six times more than sufficient to pay his debts; and therefore, not only was there no diligence against him, but he was a man in entire good circumstances and credit.

However, some years after this, Robert Dalrymple fell into a dissipated way of life, which obliged him to sell tenement after tenement, of which he as fast spent the price; and having not only neglected to pay his father's debts, but also contracted several of his own, the creditors at last proceeded in diligence. However, the first adjudication, which was led by Sir James Cuninghame, does not bear date till November 1738, very near three years after Robert Dalrymple's disposition to the petitioners. And even after his creditors proceeded in diligence, the value of his subjects was above his debts; but his credit being broke, he went off to Jamaica, and in a few years died there, a bachelor, and intestate.

The petitioners, and their mother Mrs Dalrymple, were very desirous of coming to an agreement with the creditors; and various communings ensued between them and the petitioners, assisted by Mr Guthrie, who had been doer for them since their brother's death.

The

The transaction not having been pushed by Mr Guthrie with the dispatch that was expected, the widow, and the petitioner Mr Forbes, who were anxious to preserve at least the house in Fisher-row, which had been, as above mentioned, disposed in security to William Frazer in 1736, Mr Forbes applied to Mr Frazer himself, who assured him in very strong terms, that he was disposed to serve him, and give him an ease. This appears from a memorandum of Mr Frazer's hand-writing to Mr Forbes, in process, which concludes in these words. " He (viz. Mr Frazer) is under no necessity " to sell his right, but to accommodate Mr Forbes, to whom " he will assign his right easier than to any other person, as " he and his spouse seem to have an inclination, and indeed " a *natural right* to possess these subjects."

This Mr Forbes communicated to Mr Guthrie; but by different accidents the matter was put off from time to time till 1767, when Mr Frazer died.

About six weeks after Mr Frazer's death, Mr Forbes caused application to be made to his son, in order to get the transaction finished that had been commenced upon by him and the father: but Mr Forbes, to his great surprise, found that Mr Guthrie had purchased the debt, and got an absolute disposition to it in his own name.

The widow having died on the 16th May 1769, Mr Guthrie, who it seems had purchased in the other debts at a great advantage, thought proper to raise against the petitioners a process of ranking and sale of the different tenements belonging to their father and brother, including the two small houses disposed to them as above mentioned by their brother in January 1736.

Compearance was made in this process for the petitioners; who produced their disposition and infeftment, and insisted that the houses disposed to them should be struck out of the whole.

Mr Guthrie allowed the matter to lie over till the Lord Ordinary's

Dec. 20. 1769 ordinary's last sive-bar hour before the Christmas vacation 1769; when the cause was inrolled, and he obtained an interlocutor in absence, sustaining the libel, and allowing a proof of the rental, &c.

Against this interlocutor the petitioners reclaimed, by a representation, in which they set forth the facts above stated, and contended, That their houses ought to be struck out of the sale, as their brother had been denuded of them by the disposition in their favour, and infestment thereon; and that this right was not in any shape challengeable by Mr Guthrie, or any other creditor of their brother's; as not only was there no diligence out against him when he granted this right, but he was in entire good circumstances and credit; all which did consist, and could not but consist, with the knowledge of Mr Guthrie, from his connection with the family, as above represented.

The Lord Ordinary having ordered this representation to be answered, Mr Guthrie accordingly put in answers. But tho' the petitioners had in their representation set forth the facts as above with the greatest temper, and without any asperity or impropriety of expression; yet Mr Guthrie, in his answers, lost all temper, and abused the petitioners, particularly Mr Forbes, in a manner of which it is believed your Lordships will by no means approve.

Pag. 7. & 8. For in his answers he is pleased to express himself thus:
 " As to the respondent's being doer for these people, the fact
 " is this, That, by the death of John Dalrymple *anno* 1745,
 " four of William Dalrymple's daughters then alive, succeeded-
 " ed as heirs portioners to their cousin's heritable estate, the
 " management whereof was committed by their mother to
 " the respondent; and accordingly the same was recovered
 " by him about 1747 or 1748, to the amount, as he thinks,
 " between L. 1000 and L. 1200 Sterling, which was divided
 " in four equal parts; and each of them received their shares
 " in bonds and cash.

" At

“ At the time of this distribution two of these daughters
 “ were married, and in low circumstances; and, it is belie-
 “ ved, their two shares were soon swallowed up and dissipated
 “ by their husbands and their creditors; and the shares of
 “ the other two soon procured them husbands: the one to
 “ Henderson, a common ale-seller in Edinburgh, who very
 “ soon called for and got his wife's share into his hands.
 “ *And as to the youngest daughter, Griffel, while her mother was*
 “ *hospitably entertaining this Mr Forbes, out of regard to his pro-*
 “ *fession, he, though in indigent circumstances, with children by*
 “ *two former marriages, yet was he so ungrateful and ungene-*
 “ *rous, as to seduce this her youngest daughter, then a very young*
 “ *girl, to marry him: and the respondent was informed, that*
 “ *Mr Forbes applied his wife's share of the said money in payment*
 “ *of his own debts; so that he believes there was not one shilling*
 “ *to the fore of this succession several years ago.*

“ The making up titles to, and the recovery and distribu-
 “ tion of John Dalrymple's heritage among the said four
 “ daughters, his heirs, anno 1746 and 1747, was the only bu-
 “ siness wherein the respondent was ever concerned for them,
 “ or either of them; and it was upwards of fifteen years after
 “ that business was at an end, before the respondent acquired
 “ right to any of the debts now pursued on: and whatever
 “ service he thereby intended to do Mrs Dalrymple, in order
 “ that she might enjoy her life-rent (which he knew was liable
 “ to challenge) in quietness and peace, during the remainder
 “ of her days, she being then a very old woman; yet he af-
 “ firms he never conferred with Mrs Dalrymple, or any of
 “ her daughters, or their husbands, concerning the purchase
 “ of those debts; neither did he ever undertake, nor did they
 “ ever solicit him, to act or *transact* for them in any shape;
 “ and he affirms, that he purchased the said debts with his
 “ own money, and for his own behoof.

“ Such being the facts, whatever intention the respondent
 “ may have had, consistent with his own interest, to favour
 “ the

“ the deceased Mrs Dalrymple in the quiet possession of her
 “ liferent, he was in no shape bound to do so by any legal
 “ tie, far less is he under any obligation, either legal, equi-
 “ table, or rational, to divest himself of his right in favour
 “ of these representers.”

The Lord Ordinary having ordered replies on the part of the petitioners, they were given in accordingly; and in them the petitioners, from the dates of the writings in process, showed, that the petitioners brother, when he granted them the right above mentioned, had no adjudications led against him, or any other diligence whatever done; and that, on the contrary, he was in entire good circumstances and credit.

The petitioners likewise contended, That the said two houses ought to be struck out of the sale, as their brother had been effectually denuded of them by the disposition and infestment in their favour: and although Mr Guthrie were to bring a reduction of this right, it was impossible he could prevail, nothing being more established in law, or plainer to common sense, than that even a gratuitous deed, granted by a man when solvent, and in good circumstances and credit, cannot be set aside on account of a supervenient insolvency, occasioned by debts contracted with creditors at a great distance of time thereafter.

And with regard to that passage in Mr Guthrie's answers, the replies bore, that “ Mr Forbes is persuaded, your Lord-
 “ ships will take notice of this unmerited abuse, and order
 “ it to be struck out of that paper. He will only beg leave
 “ to say, in his own vindication, That he is the representa-
 “ tive of a family in Aberdeenshire, which, for several cen-
 “ turies, has been very much respected; that he himself is
 “ possessed of a remnant of the once opulent family-estate;
 “ and that this remnant is free and unincumbered, and far
 “ more valuable than Mr Dalrymple's subjects; that he ne-
 “ ver was in indigent circumstances; but has brought up a
 “ numerous family with credit and reputation, and given
 “ them

" them all a liberal education ; That he was eight years a
 " widower, living in the same parish with Mrs Dalrymple, be-
 " fore he married her daughter ; that not only the mother,
 " but her relations, who are of some note, were consulted up-
 " on the occasion, and did all of them approve of, and con-
 " sent to, the match ; and at the time of the marriage Mrs
 " Forbes was twenty-nine years of age ; and that she is am-
 " ply provided in a jointure, in case of her husband's
 " predecease."

With regard to the alledgeance, That Mr Guthrie had been
 doer for the family, the petitioner could by no means retract
 it. There was evidence of it from his accounts, for business
 done for a tract of years ; which indeed was not denied by
 Mr Guthrie. And it was a mistake in him to say, that his
 connection had ceased for fifteen years before he purchased
 the debts. He continued in Mrs Dalrymple's confidence till
 spring 1767, that she heard he had purchased Mr William
 Frazer's debt, in his own name, and for his own behoof ; and
 then, and never till then, she employed another man of bu-
 siness. Besides, as Mr Guthrie sets forth, that his reason for
 purchasing the debts was to serve Mrs Dalrymple, by protect-
 ing it from any challenge, that seems to imply, that his
 connection with her was by no means over, as Mr Guthrie
 surely would not have imbarassed himself with purchasing
 a number of debts to serve a person who was altogether a
 stranger to him, or with whom he had ceased to have any
 connection for fifteen years before : though at the same time the
 petitioners cannot conceive in what respect their mother's
 liferent was challengeable, as the subjects which her husband
 purchased were taken to her and him in liferent, and she was
 thereupon infest, and her husband, at his death, left no debts
 behind him.

The Lord Ordinary, upon advising the representation, an-
 swers, and replies, ordained these houses to be struck out of
 the sale ; and to this interlocutor his Lordship adhered, upon

a representation for Mr Guthrie, and answers for the petitioners. But his Lordship, by two subsequent judgements, found the petitioners not intitled to expences.

The petitioners do not mean to trouble your Lordships with a long argument upon this question. They have laid before your Lordships the facts that were laid before the Lord Ordinary. In their apprehension, it was wrong in Mr Guthrie, on several accounts, to comprehend the two houses above mentioned in his summons of sale, and to maintain a litigation with the petitioners, in order to have them brought to a sale; and therefore the petitioners imagine they ought to be found intitled to the expence they were put to in defending themselves.

The petitioner Mr Forbes cannot help thinking himself extremely ill used in the above-mentioned passage of Mr Guthrie's answers. Such an accusation must lie heavy upon any man, especially upon one of his profession; and therefore he submits to your Lordships, if he is not intitled to the ordinary reparation in such cases, by having the intemperate expressions struck out of the paper, so as they may not enter the record.

May it therefore please your Lordships, to review the Lord Ordinary's interlocutors; and to find Mr Guthrie liable to the petitioners for the expence of their defence in this question; and also to ordain the above-transcribed passage of Mr Guthrie's answers to be struck out, so as the same may not enter the record.

According to justice, &c.

JO. MACLAURIN.

11 JU 62

CLAIM of EXPENCES, Mrs Jean and
Grizel Dalrymples, and their husbands,

A G A I N S T

Mr Hary Guthrie.

MRS Dalrymple, the claimants mother, the liferentrix, having died upon the 16th day of May 1769, Mr Guthrie, who had been her and their doer, raised process of ranking and sale of the whole subjects liferented by her, upon the 23d day of May 1769: in which process, Mr Guthrie included two small houses in Edinburgh, which had been disposed to the claimants by their brother, subject to their mother's liferent, which continued for above thirty-three years thereafter, and was the only share they were to get of their father's estate; and their right to these houses was long prior to the adjudications purchased up by Mr Guthrie, and made the foundation of this process.

That upon the 21st December 1769, the claimants produced their disposition and infeftment in Mr Guthrie's process, with a representation against an interlocutor pronounced in absence the day before by Lord Barjarg Ordinary, allowing a proof of the rental of the subjects contained in the summons, &c. wherein they set forth the fact, That their brother, at the time of granting this disposition to them, and for a long time thereafter, was solvent; and that all the adjudications purchased by Mr Guthrie were long posterior to their right: therefore the claimants now say, *That supposing Mr Guthrie had had no previous knowledge of their titles*, he could not after this production *bona fide* dispute the subjects being struck out of the summons; and as he did dispute it, and entered into a very long litigation, and threw out many things very improper and injurious, the claimants think, that, in justice, they ought to be indemnified of this expence, which they have been most unnecessarily put to.

Mr

1770. Jan. 29.	Mr Guthrie having given in long answers to the above representation,—To borrowing up the same,	L. 0 1 0
	The Lord Ordinary having appointed replies to be given in thereto, —To making a copy of the representation and answers, to be sent to the country for information, 13 pages,	0 3 3
	To drawing a full memorial to lay before Mr Maclaurin Advocate, —To draw a reply, 7 sheets,	0 0 0
	To making a fair copy thereof, 13 pages,	0 3 3
Feb. 6.	To a fee to Mr Maclaurin,	2 2 0
	To his clerks, and for extraordinary writing,	0 10 0
12.	To making a copy of Mr Maclaurin's reply, 16 pages,	0 4 0
	To the clerk's servant therewith,	0 1 0
21.	Mr Guthrie having given in a long duply,—To the clerk's servant at borrowing up the same,	0 1 0
Feb. 22.	To making a copy of the duply to send to the country, 9 pages,	0 2 3
27.	The Lord Ordinary having advised the process this day,—To paid his clerk for trouble at advising, To the clerk's servant at borrowing up the process to see the interlocutor,	0 2 6 0 1 0
Mar. 8.	Mr Guthrie having given in a representation against the Lord Ordinary's interlocutor, ordaining the houses to be struck out, which was appointed to be answered,—To borrowing up the process for that purpose,	0 1 0
June 12.	To a fee to Mr Maclaurin to draw answers to the above representation, To his clerks fees, and for writing,	2 2 0 0 10 0
19.	To making a fair copy of Mr Maclaurin's answers, 18 pages To the Lord Ordinary's clerk, and clerk's servant's dues of the answers,	0 4 6 0 3 6
July 10.	The Lord Ordinary having adhered to his interlocutor, but this day refused expences,—To borrowing up the process, To drawing a representation against the same, 3 sheets, To writing and copying the same, 10 pages, To the Lord Ordinary's clerk, and clerk's servant's dues thereof,	0 1 0 0 2 6 0 3 6
16.	The Lord Ordinary having refused the representation,—To the clerk's servant at borrowing the process to reclaim,	0 1 0
24.	The process being called back,—To borrowing the same again to lay before Mr Maclaurin, To a fee to Mr Maclaurin to draw the petition, To his clerks, and for writing,	0 1 0 2 2 0 0 10 0
27.	To making clerk's copy of the petition, 18 pages, To the clerk's fees thereof, To printing the same, 50 copies,	0 4 6 0 4 10 0 18 6
	To agent's fee,	11 JU 62.

Neat disbursements in litigation after the claimants

titles were produced,—beside the blank articles, L. 11 1 1

To printing claim of expences, 50 copies, 0 9 0

L. 11 10 1